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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-283

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents,

BRIEF FOR THE PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (pg. 26a of Appendix to Petition) is reported at 519 F.2d 559. The opinion of the District Court for the District of Connecticut (pg. 2a of Appendix to Petition) is reported at 390 F.Supp. 278.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 2, 1975 and this petition for certiorari was filed on August 25, 1975 and was granted on December 15, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Whether, if private individuals prevail against state officials in a suit under Title VII of the Civil Rights Act of 1964,

as amended, by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., the Eleventh Amendment bars an award to those plaintiffs of reasonable attorneys' fees as a part of the costs.

Does the Eleventh Amendment to the Constitution of the United States of America prohibit the award of attorneys' fees against the defendants, Chairman of the State Employees' Retirement Commission, Treasurer of the State and Comptroller of the State, since these fees are to be paid out of the State Treasury?

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuteed against one of the United States by the Gitizens of another state or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

The Connecticut State Employees' Retirement Act granted to women employees having 25 or more years of state service the right to retire with pension rights five years earlier than men with identical service qualifications, so that women could retire at age 50, while men were not permitted to retire until age 55. The Retirement Act also contained provisions described as discriminatory rate differentials which favor female employees over male employees, who have worked less than 25 years. These laws authorized reduced retirement benefits to employees who were separated from state employment before they were normally eligible to retire, based upon the aforesaid preferred age differentials.

This suit was instituted as a class action in behalf of all "male" state employees or former state employees who were members of the Connecticut State Employees' Retirement system. The suit not only asserted equal protection claims under the Fourteenth Amendment to the Constitution of the United States, but also asserted statutory violations under the Civil Rights Act of 1871, 42 U.S.C. § 1983. The plaintiffs sought both declaratory and injunctive relief. A three-judge court was convened to hear the case pursuant to 28 U.S.C. §§ 2281 and 2284. On October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e, et seq. Title VII originally did not apply to state governments, but had been amended effective March 24, 1972 to include the state governments within its scope. The case was then remanded to Chief Judge Clarie, sitting as a single district judge for resolution of the claims pursuant to 28 U.S.C. § 2281. Judge Clarie determined that the State Employees' Retirement Act violates Title VII insofar as it discriminates in favor of women in the computation of retirement benefits. The defendants did not appeal from the District Court's ruling that the Retirement Act violates Title VII. Neither did the defendants appeal from the order which prohibited future payments from the Retirement Fund or from other state monies under the Retirement System in a manner which would discriminate against men on the basis of sex. The plaintiffs had also sought to have the retirement benefits for all living retired male employees recalculated retroactively and had also claimed attorneys' fees and costs. Chief Judge Clarie held that the Eleventh Amendment to the Constitution of the United States barred a retroactive money judgment that would be paid by state funds. He also declined to grant attorneys' fees and costs. The plaintiffs appealed from Judge Clarie's ruling. The United States Court of Appeals for the Second Circuit upheld Chief Judge Clarie's rulings that the district court could not grant retroactive damages against the State of Connecticut, but that

the district court could grant prospective injunctive relief against state officers. The Court of Appeals differed with Chief Judge Clarie's ruling on attorneys' fees and remanded "the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded."

As a result of Judge Clarie's decision, as affirmed, the Connecticut General Assembly removed, in 1975, the discriminatory age and rate differentials based on sex. P. A. 75-531.

SUMMARY OF ARGUMENT

This Court, in *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347 (1974), has affirmed the principle that the Eleventh Amendment prohibits a federal court from awarding damages against an unconsenting state as an unconstitutional interference in the monetary affairs of a state. *Edelman* has been cited by courts of appeal as authority for the awarding of attorneys' fees and as authority for the denial of attorneys' fees.

An award of attorneys' fees cannot be considered to be an incidental part of an order granting injunctive relief. This Court did not intend that the necessary monetary consequences of injunctive relief be extended to include the payment of attorneys' fees.

The State of Connecticut had never waived its immunity under the Eleventh Amendment. Such a waiver would require a deliberate and express action on the part of the State of Connecticut. This Court has ruled that the surrender of constitutional rights will not be constructively construed from actions of the state, but such waiver must be clearly expressed. *Murray* v. *Wilson Distilling Co.*, 213 U.S. 151, 29 S.Ct. 458 (1909).

For a federal court to award attorneys' fees where a state has not made provision for the payment of attorneys' fees, is

to order a state official to misappropriate his agency's funds in order to avoid a contempt citation. There can be no payment of funds from the state treasury unless an appropriate statutory or budgetary provision has been made for expenditure.

ARGUMENT

EDELMAN v. JORDAN DOES NOT PERMIT RECOVERY OF ATTORNEYS' FEES AS A PERMISSIBLE ANCILLARY EFFECT.

The United States Court of Appeals for the Second Circuit, in ruling on this case, said that attorneys' fees may be assessed as having a permissible ancillary effect on the state treasury. However, it is our contention that awarding attorneys' fees, in this case, is not merely a subordinate or auxiliary part of the orders issued.

The United States Court of Appeals for the Second Circuit in quoting this Court stated that this Court has characterized "ancillary effect on the state treasury" as a "permissible and often inevitable consequence of the principle announced in Ex Parte Young . . ." *Edelman* v. *Jordan*, 415 U.S. 651, 668, 94 S.Ct. 1347, 1358 (1974).

The Court below did not choose to quote the entire expression of the thinking of the United States Supreme Court and in so doing has chosen to grant a different meaning to an emerging principle than conceivably was intended by this Court.

In *Edelman* v. *Jordan*, *supra*, the Court's pertinent statement in full, was:

> "But the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature.

> State officials, in order to shape their official conduct to the mandate of the court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct. Such an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle announced in Ex Parte Young, supra." *Supra*, at 668-669, 94 S. Ct. 1358.

It is our belief that this Court in *Edelman* was stating that in ordering a state official to comply with the requirements of the constitution, it may be possible that the state official may also have to order that money be paid out of the state's treasury. That there happens to be a need to pay out money as a necessary and inevitable consequence of complying with the main impact of the court's order, that payment in those limited cases is the subordinate or ancillary effect of the order.

An example of such an order and its inevitable financial consequence would be a judgment which states that an employee should be reinstated to his position. However, as a result of reinstating the employee, it will be necessary to pay salary for the services which the employee renders in the future. This payment of the salary would be the inevitable financial consequence of the order. To then order the payment of attorneys' fees would not be a natural and inevitable consequence of reemploying the wronged individual.

We do not believe that the courts may, in the course of issuing an appropriately correct judgment, decide that in each and every case they may order the states to pay attorneys' fees by merely stating that the awarding of attorneys' fees is a subordinate and insignificant part of this order.

This Court has stated a principle which several of the courts of appeal refused to read and interpret correctly. They apparently believe that in arriving at any correct judgment

and order, whether or not such order can affect a state treasury, that they may append an order requiring a state to pay attorneys' fees and declare this order to be merely ancillary in its effect.

Courts of appeal in several circuits have arrived at the conclusion that language in *Edelman* permits the awarding of attorneys' fees against the state. In *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975), *Class* v. *Norton*, 505 F.2d 123 (2nd Cir. 1974) and *Jordan* v. *Fusari*, 496 F.2d 646 (2nd Cir. 1974) these courts upheld the awarding of attorneys' fees as having a permissible "ancillary effect on the state treasury" resulting from compliance with the granting of injunctive relief. These courts did not deny that the attorneys' fees must be paid out of the state treasury, but rather they believed that the amounts awarded would only have a minimal effect upon the financial condition of the states, as well as being a necessary result of awarding injunctive relief.

Other courts of appeal have disagreed with this reading of *Edelman*. The Third, Fifth and Sixth Courts of Appeal have thus disagreed with the aforementioned courts of appeal. In *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 42 (3rd Cir. 1974), vacated and remanded 421 U.S. 983, 95 S.Ct. 1986 (1975), that Court held:

> "Edelman, while not ruling on the matter specifically, appears to bar the award of attorneys' fees from the state treasury as well."

The Court further opined:

> "We think Edelman must be read as closing the door on any money award from a state treasury in any category." *Supra*, at 42-43, n. 7.

In *Jordan* v. *Gilligan*, 500 F.2d 701, 704-705 (6th Cir. 1974), cert. den. 421 U.S. 991, 95 S.Ct. 1996 (1975) the Court

of Appeals for the Sixth Circuit held that "[a]ny award of attorneys' fees whether against the State of Ohio or its officials, vitally affects the rights and interests of the state in preserving its revenues.", and at page 709, the Court concluded "the Eleventh Amendment prohibits the awarding of attorneys' fees against unconsenting sovereign states." Accord, *Taylor* v. *Perini*, 503 F.2d 899 (6th Cir. 1974), vacated on other grounds, 421 U.S. 982, 95 S.Ct. 1985 (1975); *Named Individual Members* v. *Texas Highway Department*, 496 F.2d 1017 (5th Cir. 1974).

It might be said that some of the courts of appeal have held that the awarding of attorneys' fees is tantamount to awarding retroactive money damages against a sovereign state, while those courts of appeal holding the opposite opinion believe that the awarding of attorneys' fees is part and parcel of the equitable relief provided by injunction.

An order to pay attorneys' fees is a distinct and separate order, completely separate and apart from the order in the main and intended part of the case. Including the order for the payment of attorneys' fees within the same sentence as the main order does not reduce the attorneys' fees to an ancillary part of the order. No tricks of semantics or self delusion that because the amount of the attorneys' fees is a very small sum makes it a necessary consequence of the order. The order for the payment of attorneys' fees might be likened to the small and insignificant tip of the iceberg visible above the surface of the water. Judge Clarie expressed it clearly when he stated:

> "While the amount sought in this case is not prohibitive, once the floodgates are opened, adequate control no longer prevails." *Fitzpatrick* v. *Bitzer*, 390 F.Supp. 278, 289 (D. Conn. 1974), aff'd in part, rev'd in part, and remanded 519 F.2d 559 (2d Cir. 1975).

THERE ARE NO STATE FUNDS AVAILABLE FOR PAYMENT OF ATTORNEYS' FEES UNLESS THEY ARE SPECIFICALLY INCLUDED IN THE STATE BUDGET.

Attorneys' fees to be paid a state do not come from some vast, anonymous monolith. The attorneys' fees come from the pockets of the taxpayers.

In light of recent headlines, it is easy to fall prey to the all too common idea that the government is a huge bottomless pocket and no one will ever miss this miserly sum. This is a time when some citizens have become almost impervious to cries of mishandling of government funds. Deliberate deceptions practiced by administrative agencies to avoid the intended impact of corrective legislation are common national headlines. A sign of our times seems to be frequently used expressions that the government can afford it, the government will never miss it.

Connecticut being one of the smallest states provides an excellent laboratory to illustrate that every dollar must come from a taxpayer's pocket and that no money is available to a state agency unless it is provided in the state budget. See § 4-97, Conn. Gen. Stat., as amended.

Once a taxpayer has paid his taxes into the state coffers, it does not disappear into a vast maw to be expended at the mere whim of state officials in fanciful unauthorized projects.

In Connecticut, each state agency's proposed budget for the coming fiscal year is presented to the state legislature for its consideration. § 4-71, Conn. Gen. Stat., as amended. In those areas in which the State of Connecticut has not waived its sovereign immunity, no state agency is granted funds to pay damages or attorneys' fees. A state agency which does not have the statutory authority to pay damages or attorneys' fees

cannot include such a request in its budgetary request for money. No request having been made, no money is allocated, none is available to pay damages or attorneys' fees. §§ 4-97, 4-97a, Conn. Gen. Stat., as amended.

There are, of course, certain statutory provisions permiting the head of a state agency to make limited, minor changes in the items he may purchase with the funds allocated to his agency. § 4-94, Conn. Gen. Stat., as amended.

The State Comptroller, in fulfilling his statutory duties, cannot make a decision to pay court ordered attorneys' fees out of an agency's budget on a theory that maybe it was a legislative oversight. Neither can he issue his warrant to the State Treasurer directing him to dip into the state's general fund and issue a check in payment of the attorneys' fees.

In times of economic distress, a state will, in many instances, discover a shortfall between anticipated income and income actually received. Under those deficit circumstances, there are insufficient funds in the state treasury to give each agency the money allocated to it by the budget. Now, at the direction of the Governor, each agency cuts back on its proposed spending. § 4-85, Conn. Gen. Stat., as amended. Projects are discontinued and disaster strikes the state employees, some are laid off to effect the needed economies. See, e.g., §§ 3-6, 5-241, Conn. Gen. Stat., as amended.

Now, if a court were to order a state agency to pay attorneys' fees at this time, where would the money come from? Should more employees be laid off to provide the fees? If, perchance, the order was to the Department on Aging maybe the only way to avoid a contempt citation is to take money from "meals on wheels" which provides hot meals to shut-in senior citizens.

Money with which to pay unbudgeted attorneys' fees is not included in any state agency's budget. Even if, on the day of this writing, there had been a budgetary surplus instead of a deficit, even if it had not been necessary for the Governor of the State to announce the necessity of closing Cedarcrest Hospital and the laying off of over one hundred seventy employees, even if we had a surplus of millions, unless provision is made for a payment in its budget, a state agency has no authority to make an expenditure of state funds. § 4-97, Conn. Gen. Stat., as amended; see also § 4-92, Conn. Gen. Stat., as amended.

The Governor's office has a relatively small contingency fund with which to meet emergencies. § 4-84, Conn. Gen. Stat., as amended. Assuming *arguendo* that the payment of attorneys' fees may be deemed an "emergency" within the purview of the statute, this $100,000.00 contingency fund would not permit the payment of attorneys' fees in many cases.

THE STATE OF CONNECTICUT HAS NOT WAIVED ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT.

The Constitution of the State of Connecticut, Eleventh Article, Section 4, states:

> "Claims against the state shall be resolved in such manner as may be provided by law."

It cannot be argued that this constitutional provision is a waiver of the Eleventh Amendment to the Constitution of the United States. It grants the General Assembly of the State of Connecticut the authority to determine if, when and how claims against the state shall be made.

The General Assembly has adopted several statutes which permit the institution of actions against the state or against certain state officials. None of these statutes is applicable in the matter presently before the Court.

One of the areas in which claims against the State of Connecticut may be resolved is set forth in Chapter 53 of the Connecticut General Statutes entitled "Claims Against The State". This statute specifically excludes "claims for the periodic payment of disability, pension, retirement or other employment benefits."

The cause of action now before this court was based upon certain claims for retirement benefits. The statute authorizing the appointment of the Claims Commissioner for the State of Connecticut specifically excludes the consideration of claims concerning retirement benefits from the jurisdiction of the Claims Commissioner.

The deliberate exclusion of this area from the jurisdiction of the official empowered to hear claims and to authorize the institution of actions against the state, must be considered to be a positive refusal by the state to waive its immunity in all areas not specifically waived by the statute.

Assuming even that the passage of Chapter 53 of the Connecticut General Statutes does not serve to state that the State of Connecticut has not waived its Eleventh Amendment immunity, it is not necessary for a state legislature to pass a statute or resolution which will specifically cry out "Know Ye All Men by these presents that the State of Connecticut does hereby refuse to waive its immunity under the Eleventh Amendment of the Constitution of the United States of America."

It is almost axiomatic that in the construction of statutes a state agency has no authority other than that granted it by

statute or by necessary implication. It follows that the actions of the state are read in its statutes or by necessary implication. Thus, a state legislature must speak in the clearest of terms when the decision is being made to waive the immunity of the state.

A waiver must not only be clearly intended as a waiver, but there must be an appropriation of funds to implement the waiver. Any waiver of Eleventh Amendment immunity without an appropriation to permit the payments involved is an incomplete act and should not be considered as an absolute waiver.

This Court has stated that in determining whether a state has waived its constitutional protection under the Eleventh Amendment, it would require that the waiver be in the clearest possible language and that it would not adopt a ruling by which it is found that a state constructively consented to the institution of a suit.

> ". . . Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464 53 L.Ed. 742 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1945) (footnote omitted). '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be

found.' " *Edelman* v. *Jordan*, 415 U.S. 651, 673, 94 S.Ct. 1347, 1360.

Chapter 53, Connecticut General Statutes, does not state that the State of Connecticut consents to suit in the federal courts. There is no statutory indication that Connecticut has waived its right to raise the protection of the Eleventh Amendment. Chapter 53 provides a procedure for obtaining authorization to sue the state in the state courts only.

This Court has held that even in those cases where a state has specifically waived its sovereign immunity and consented to suit by its own citizens that the Eleventh Amendment has not been waived without a clear showing that the state consented to the suit. *Smith* v. *Reeves*, 178 U.S. 436, 20 S.Ct. 919 (1899); *Chandler* v. *Dix*, 194 U.S. 590, 24 S.Ct. 766 (1903); *Great Northern Life Insurance Co.* v. *Read*, 322 U.S. 47, 64 S.Ct. 873 (1944). See also, *Richin* v. *Industrial Construction Inc.*, 502 F.2d 1051, 1055 (10th Cir. 1974).

The fact that when the State of Connecticut deems it appropriate it waives its sovereign immunity "by the most express language" is admirably demonstrated by § 52-556, Connecticut General Statutes, which states:

> "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

There is no Connecticut General Statute or Resolution of the State Legislature stating that the State of Connecticut has waived its immunity under the Eleventh Amendment of the Constitution of the United States.

The only ways in which the State of Connecticut could waive its Eleventh Amendment immunity would be by the passage of a statute or by an amendment to the State Constitution. No such waiver exists.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below concerning the payment of attorneys' fees should be reversed.

Respectfully submitted,

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